Ahmad Radhiq Arbee bin Ahmad Rejal Arbee (as a husband and dependant of Sharifah Shalihah bt Sayed Abdullah, deceased) & Ors v Kerajaan Malaysia & Ors

HIGH COURT (SHAH ALAM) — SUIT NO 21NCVC-85–10 OF 2018
GUNALAN MUNIANDY J
30 JANUARY 2020

Damages — Assessment — Computation — Liability conceded by defendants — Claim for general damages and aggravated damages — Whether sufficient evidence provided in determining damages claimed

This was a claim the Government of Malaysia ('the defendant') for vicarious liability for the alleged negligence of the medical officers at the Shah Alam Hospital who had treated and managed the deceased prior to her death. The plaintiffs were the dependants' of one Sharifah Shalihah bt Sayed Abdillah ('the deceased'). The deceased was admitted to the defendant's hospital in Shah Alam on 10 April 2017 to deliver her third child. The deceased died on 12 April 2017 after the delivery of her third child due to postpartum hemorrhage. Sometime after the death. The question of liability was not an issue in trial as it was conceded by the defendant. The damages were ordered to be assessed and costs to be determined thereafter. The dispute between the parties on the quantum to be awarded for the claim was centred mostly on the claims under general damages ('GD') and aggravated damages ('AD'). The GD claim was made under the following heads: (a) loss of contribution to the plaintiffs under ss 7 and 8 of the Civil Law Act 1956 ('the CLA'); (b) loss of services and society as mother of deceased's children; (c) statutory bereavement under s 7(3A) of the CLA; and (d) pain and suffering before death of deceased. AD was claimed in this case on the ground that the aggravating factors that led to the death of the deceased, thus, depriving the deceased's three children of their mother and depriving the first plaintiff of his wife and life partner. The defendant's hospital was alleged to have been negligent in not treating the deceased properly and with urgency as well as not providing a proper explanation to her family when she was in a critical condition. Special damages (SD) was claimed for the following items: (i) hospital expenses and medication for the sum RM837; (ii) travelling expenses for members of the deceased's family in the sum of RM1,250; (iii) funeral expenses in the sum of RM7,000; and (iv) cost of RM7,879 for discovery proceedings to obtain medical records.

Held, allowing the claim with costs of RM70,000:

(1) For the appropriate award for SD, the court took into consideration the trite principle as to the requirement for strict proof; the evidence led by

the plaintiffs; the various issues raised by the defendant; and the insufficiency of the said evidence in respect of some of the heads of claim as well as certain concessions by the defendant to award reasonable sums, the court awarded SD as follows: (a) loss of services and society in favour of the third and fourth plaintiffs RM44,770; (b) hospital ('H') charges: RM837; (c) travelling costs to (H): RM1,000; (d) funeral expenses: RM5,000; and (e) legal costs for documents/discovery proceedings not SD but to be claimed under costs (see para 18).

(2) The court agreed with the defendant's contention that from the overall evidence, the deceased's earnings prior to her demise, average last monthly income was between RM3,000 and RM3,200. However, considering that the figures were all estimates and averages and that the earnings were not fixed or consistent as well as the deceased's financial commitments to the family which was unchallenged, the court assessed the reasonable figure for her monthly contribution after having deducted about 1/3 for her own living expenses to be RM2,200 per month. Using a multiplier of 9.5 years based on her age at the time of death, the total figure for loss of support came to RM250,800 or RM2,200 per month for 9.5 years in respect of the first, third and fourth plaintiffs (see para 22).

(3) As there was evidence of contribution by the deceased to her mother during her lifetime, the court made a reasonable award in the sum of RM34,200, being contribution at RM200 per month for 9.5 years which is the statutory multiplier (see para 23).

(4) The court was satisfied that the established factors for awarding AD had been fulfilled by the plaintiffs. The plaintiffs were correct in submitting that the contention by the defendant in putting the blame on the deceased in their defence had affected and injured the feelings of the plaintiffs since the truth was that the deceased died due to the negligence of the defendant's hospital as admitted by them when they conceded on liability. The court assessed the reasonable and appropriate figure for AD to be RM300,000. Taking into account the trite principle that AD like other forms of damages was meant to be compensatory, additional to GD, and not to be punitive against tortfeasors, especially those acting in the course of duty as in this case (see paras 28–29).

[Bahasa Malaysia summary

Ini merupakan tuntutan Kerajaan Malaysia ('defendan') bagi liabiliti vikarius untuk kecuaian yang dikatakan dilakukan oleh pegawai perubatan di Hospital Shah Alam yang telah merawat dan menguruskan si mati sebelum kematiannya. Plaintif merupakan tanggungan Sharifah Shalihah bt Sayed Abdillah ('si mati'). Si mati telah di masukkan ke hospital defendan di Shah Alam pada 10 April 2017 untuk melahirkan anaknya yang ketiga. Si mati telah

meninggal dunia pada 12 April 2017 selepas melahirkan anaknya yang ketiga atas sebab pendarahan postpartum. Beberapa ketika selepas kematiannya. Persoalan liabiliti bukan satu isu sewaktu perbicaraan kerana ianya telah diakui oleh defendan. Ganti rugi diperintahkan untuk ditaksirkan dan kos untuk ditentukan selepas dari itu. Pertelingkahan antara pihak-pihak adalah berkenaan dengan kuantum untuk diawardkan untuk tuntutan yang berdasarkan tuntutan ganti rugi am ('GD') dan ganti rugi teladan ('AD'). Tuntutan GD dibuat di bawah asas berikut: (a) kerugian sumbangan plaintif di bawah ss 7 dan 8 Akta Undang-Undang Sivil 1956 (CLA); (b) kehilangan khidmat dan masyarakan sebagai ibu kepada anak-anak si mati; (c) kehilangan statutori di bawah s 7(3A) CLA; dan (d) kesakitan dan keseksaan sebelum kematian si mati. AD yang dituntut di dalam kes ini adalah atas alasan faktor pemberatan yang membawa kepada kematian si mati, dan dengan itu, menghalang tiga orang anak si mati dari ibu mereka dan menghalang plaintif pertama dari isterinya. Defendan hospital dikatakan telah cuai dengan tidak merawat si mati dengan betul dan segera dan tidak memberikan penjelasan yang betul kepada keluarganya semasa dia berada dalam keadaan kritikal. Ganti rugi khas ('SD') dituntut untuk perkara berikut: (i) perbelanjaan hospital dan ubat dalam jumlah RM837; (ii) perbelanjaan perjalanan untuk ahli keluarga si mati dalam jumlah RM1,250; perbelanjaan pengebumian dalam jumlah RM7,000; dan (iv) kos RM7,879 untuk prosiding penzahiran untuk mendapatkan rekod perubatan.

Diputuskan, membenarkan tuntutan dengan kos sebanyak RM70,000:

(1) Bagi award yang sesuai untuk SD, mahkamah mengambil kira prinsip mantap berkenaan keperluan pembuktian ketat; keterangan yang dikemukakan oleh plaintif isu-isu yang dibangkitkan oleh defendan dan ketidakcukupan keterangan berkaitan dengan beberapa asas tuntutan dan juga beberapa pengakuan oleh defendan untuk mengawardkan jumlah munasabah, mahkamah mengawardkan SD seperti berikut: (a) kehilangan khidmat dan masyarakan bagi pihak plaintif ketiga dan keempat RM44,700; (b) caj hospital (H): RM837; (c) kos perbelanjaan ke (H) RM1,000; (d) perbelanjaan pengebumian: RM5,000; dan (e) kos perundangan untuk dokumen/prosiding penzahiran bukanlah SD tetapi dituntut di bawah kos (lihat perenggan 18).

(2) Mahkamah bersetuju dengan pengataan defendan bahawa daripada keseluruhan keterangan, pendapatan defendan sebelum kematiannya, purata pendapatan bulanan adalah di antara RM3,000 ke RM3,200. Namun, mengambil kira faktor bahawa semua pengiraan adalah anggaran dan purata dan pendapatan adalah tidak tetap atau konsisten dan juga komitmen kewangan kepada keluarga adalah tidak dicabar, mahkamah menaksirkan jumlah munasabah untuk sumbangan selepas menolak lebih kurang 1/3 untuk perbelanjaan hariannya sebagai RM2,200 sebulan. Mengguna pakai pengganda 9.5 tahun berdasarkan

umurnya pada waktu kematian, jumlah untuk kehilangan sokongan terjumlah kepada RM250,800 atau RM2,200 sebulan untuk 9.5 tahun berkenaan dengan plaintif pertama ketiga dan keempat (lihat perenggan 22)

(3) Memandangkan adanya keterangan sumbangan oleh si mati kepada ibunya apabila dia masih hidup, mahkamah memberi award munasabah dalam jumlah RM34,200, yang merupakan sumbangan pada kadar RM200 sebulan untuk tempoh 9.5 tahun yang merupakan pengganda statutori (lihat perenggan 23).

(4) Mahkamah berpuas hati bahawa faktor yang dibuktikan untuk mengawardkan AD telah dipenuhi oleh plaintif. Plaintif adalah betul dalam menhujahkan pengataan oleh defendan dalam meletakkan salah atas si mati dalam pembelaan mereka telah memberi kesan dan menyinggung perasaan plaintif memandangkan kebenaran adalah bahawa si mati telah mati kerana kecuaian hospital defendan sepertimana diakui mereka apabila mereka mengakui liabiliti. Mahkamah menaksirkan jumlah munasabah dan sesuai untuk AD adalah RM300,000 mengambil kira prinsip mantap bahada AD seperti ganti rugi yang lain bertujuan untuk memberi ganti rugi, tambahan kepada GD, dan tidak menghukum pelaku tort, terutama yang bertindak dalam menjalankan tugas seperti dalam kes ini (lihat perenggan 28–29).]

Cases referred to

Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281, FC (refd)

Hum Peng Sin v Lim Lai Hoon & Anor [2001] 4 MLJ 232; [2001] 4 AMR 4171, CA (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (refd)

Jub' il bin Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd [2001] 6 MLJ 669; [2001] 4 CLJ 599, HC (refd)

Nam Ho Travel Service (S) Pte Ltd v Progressive Insurance Sdn Bhd [1993] MLJU 288; [1994] 1 CLJ 280, HC (refd)

Neo Kim Soon (administrator of the estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu & Anor [1995] 3 MLJ 435; [1996] 1 CLJ 730, CA (refd)

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)

Thompson v Commissioner of Police of the Metropolis [1997] 2 All ER 762, CA (refd)

Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292, FC (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(3A), 8

Suria Kumar (Suria Kumar & Co) for the plaintiff.
Siti Asmath bt Che Man (Federal Counsel, Attorney General's Chambers) for the defendant.

Gunalan Muniandy J:

[1] To give a brief background, the plaintiffs are the dependants' of one Sharifah Shalihah bt Sayed Abdillah, deceased. The deceased was admitted to the defendant's Hospital in Shah Alam on 10 April 2017 to deliver her third child. The deceased died on 12 April 2017 after delivery of her third child due to postpartum hemorrhage. Sometime after the death of the deceased on 12 April 2017, the deceased's first child, Ahmad Abbas Arbee bin Ahmad Radhiq Arbee died on 27 September 2017 due to a tragic accident.

[2] This claim is against the defendant/Government of Malaysia for vicarious liability for the alleged negligence of the medical officers at the Shah Alam Hospital who had treated and managed the deceased prior to her demise post delivery.

[3] The first plaintiff is the deceased's husband. The second plaintiff is the deceased's mother. The third plaintiff is the deceased's second child while the fourth plaintiff is the deceased's third child.

LIABILITY

(a) this was not in issue at the trial as the defendant conceded on liability but only after this matter was fixed for full trial from 5–7 August, 2019;

(b) judgment on liability was recorded on 24 June 2019 with costs of the claim to be determined at the end of the case; and

(c) damages were ordered to be assessed and costs for the assessment of damages were also to be determined thereafter.

QUANTUM

[4] The dispute between the parties on the quantum to be awarded for the claim was centred mostly on the claims under general damages ('GD') and aggravated damages ('AD'). The GD claim was made under the following heads:

(a) loss of contribution to the plaintiffs under ss 7–8 of the Civil Law Act 1956 ('the CLA');

(b) loss of services and society as mother of deceased's children;

(c) statutory bereavement under s 7(3A) of the CLA; and

(d) pain and suffering before death of deceased.

[5] AD was claimed in this case on the ground that the aggravating factors in our present case led to the death of the deceased, thus, depriving the deceased's three children of their mother and depriving the first plaintiff of his wife and life partner. The defendant's hospital was alleged to have been negligent in not treating the deceased properly and with urgency as well as in not providing a proper explanation to her family when she was in a critical condition.

[6] Special damages ('SD') was claimed for the following items:

(a) hospital expenses and medication for the sum RM837;

(b) travelling expenses for members of the deceased's family in the sum of RM1,250;

(c) funeral expenses in the sum of RM7,000; and

(d) cost of RM7,879 for discovery proceedings to obtain medical records.

PRINCIPLES APPLICABLE TO ASSESSMENT OF DAMAGES

[7] Both parties referred to several important authorities on the correct approach that the court should adopt in deciding on the entitlement to damages claimed and the right amount or quantum to be awarded.

[8] In *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 at pp 10–11(FC) it was laid down that:

> It is trite that damages serve as a compensation, not a reward, less still a punishment. In assessing damages the court should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation.

[9] In *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292 (Tab 2), Raja Azlan Shah CJ (Malaya) (as he then was) remarked:

At para G, p 293:

> It must be remembered that the purpose of damages is to try, so far as humanly possible, to put the victim back to the position he would have been in before the accident. The damages must be fair, adequate and not excessive ...

[10] Similarly, in *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 (Tab 3), Syed Agil Barakhbah FJ reminded at para G, p 334:

> ... It has to be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate... The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant.

[11] As regards the GD claim for loss of services and society of a mother, the plaintiffs relied on the following two authorities:

[12] In *Neo Kim Soon (administrator of the estate of Phanna Mannechuang, deceased) v Subramaniam a/l Ramanaidu & Anor* [1995] 3 MLJ 435; [1996] 1 CLJ 730, Shankar JCA in the Court of Appeal held as follows:

> We agree with Mr Chok Chin You of Counsel for the plaintiff/appellant that what has been done away with by the proviso (iii) is an award of damages, in this case to the deceased's husband, only on the ground that he has been deprived of the services or society of his wife. So far as a surviving husband is concerned the proviso has abolished any award by way of general damages for loss of consortium. In other words proof of the death of a wife, without more, will not entitle the surviving husband to an award in damages.
>
> As a matter of interest we observe that proviso (iii) does not preclude damages to a child for having been deprived of the services or society of his mother
>
> It is a different matter altogether where a husband has not only lost his wife, but has also been put to monetary loss which has been the direct result of the negligence. Such loss in our view continues to be recoverable.

[13] Further, Sri Ram, JCA (later FCJ) in another Court of Appeal case of *Hum Peng Sin v Lim Lai Hoon & Anor* [2001] 4 MLJ 232; [2001] 4 AMR 4171, followed the decision in *Neo Kim Soon* and stated as follows:

> The section and its third proviso were considered by this court in *Neo Kim Soon v Subramaniam* [1995] 3 AMR 2941 in almost similar circumstances. That was a case in which the wife was killed in an accident. After her death her husband engaged a servant to look after the child of the marriage.
>
> I am entirely in agreement with this view. In my judgment, what proviso (iii) to s 7(3) of the Act prohibits is an award for the loss of consortium or services where that is the sole head of claim. In my judgment the third proviso does not prohibit an award for loss of the services provided by a wife when such a claim is coupled with another head of claim for either actually engaging a housekeeper, as was the case in *Neo Kim Soon v Subramaniam*.

[14] The law on SD claims is settled that the plaintiff wholly bears the onus of proving this category of damages strictly. In *Jub'il bin Mohamed Taib Taral &*

Ors v Sunway Lagoon Sdn Bhd [2001] 6 MLJ 669; [2001] 4 CLJ 599, the principle was succinctly explained as follows:

> The general principle is that the plaintiff must be prepared to prove his special damages unless it has been agreed. It is not enough for him to write down the particulars and leave them for the court to decide. It is for him to prove them (see *Sum Kum v Devaki Nair & Anor* ... and *Khoo See Moi v Tay Teik Chang*).

[15] In regard to AD, the law is also settled. In *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 the Court of Appeal held at p 797:

> Now aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff's where this injury has been caused or exacerbated by the exceptional conduct of the defendant.
>
> Aggravated Damages are compensation for the injured feelings of the plaintiff where his sense of injury from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it. (*Broome v Cassel* [1972] AC 1027 following *Rookes v Barnard* [1964] AC 1129 accepted on *Bohjaraj* [2001] 6 MLJ 497 and *Rosharee* [1966] 3 MLJ 337.

[16] In *Thompson v Commissioner of Police of the Metropolis* [1997] 2 All ER 762, as correctly summarised in the plaintiff submission, the elements of aggravated damages were outlined as follows:

(i) Humiliating circumstances;

(ii) Conduct of defendants showing that they behaved in a high handed, malicious or oppressive manner;

(iii) The way the litigation or trial is conducted.

[17] The Federal Court in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281 (FC) in awarding AD for a medical negligence claim remarked that:

> It can be seen from the above cases that aggravated damages can be and have been awarded as a separate head of damage in tort. For example Aggravated Damages are frequently awarded in defamation cases for injury to a person's reputation. There is no reason to exclude this kind of damage from medical negligence case, which involve real injury to a person's body.

DECISION

[18] To start with the appropriate award for SD, I took into consideration the trite principle as to the requirement for strict proof; the evidence led by the plaintiffs; the various issues raised by the defendant; and the insufficiency of the

said evidence in respect of some of the heads of claim as well as certain concessions by the defendant to award reasonable sums, I awarded SD as follows:

(a) loss of services and society:

(i) Ahmad Uwais Arbee (plaintiff 3) — until six years of age:

(1) cost of care: RM500 x 8 months = *RM4,000*;

(2) taska fees: RM400pm x 12 x 3 years = *RM14,400*;

(3) yearly fees: RM790 x 3 years = RM2,370
Total: *RM20,770*

(ii) Siti Khadijah (plaintiff 4): RM500 x 12 months x 4 years = *RM24,000*;

(iii) Ahmad Abbas Arbee (deceased's first child)
Claim has to be dismissed because costs of his schooling were borne by the deceased until his demise. This is not an expense incurred by the first plaintiff following his wife's death;

(b) hospital ('H') charges: *RM837*;

(c) travelling costs to (H): *RM1,000*;

(d) funeral expenses: *RM5,000*; and

(e) legal costs for documents/discovery proceedings not SD but to be claimed under costs.

[19] In regard to GD, the substantial part of the claim was for loss of support suffered by the plaintiffs based on the deceased's contribution to the family, including her mother (the second plaintiff) during her lifetime from several sources of income which were supported by documentation and basically not challenged by the defendants.

[20] Both parties referred to several important authorities on the correct approach the court must take in deciding on entitlement to and quantum of, damages.

PRINCIPLES APPLICABLE TO ASSESSMENT OF DAMAGES

[21] It was clear from the plaintiff's own evidence through the witnesses called by them that the deceased's sources of income were from three employers/companies, namely, Philip Mutual Bhd, AIA Bhd and AIA Public Takaful Bhd which were well known insurers. The deceased received income as an insurance agent through monthly commissions and annual incentive payments both of which were not fixed but varied from time to time.

[22] I concur with the contention of the defendant that from the overall evidence as to the deceased's earnings prior to her demise, her average last monthly income would have been in the region of RM3,000 to RM3,200. However, considering that the figures are all estimates and averages and that the earnings were not fixed or consistent as well as the deceased's financial commitments to the family which was unchallenged, I assessed the reasonable figure for her monthly contribution after having deducted about 1/3 for her own living expenses to be RM2,200 per month. Using a multiplier of 9.5 years based on her age at the time of death, the total figure for loss of support came to *RM250,800.* or RM2,200pm for 9.5 years in respect of the first, third and fourth plaintiffs.

[23] As for the second plaintiff, the deceased's mother, the defendant opposed any award for her loss on the ground that it was not pleaded. However, a perusal of the plaintiffs' pleadings, particularly the statement of claim, would show that the second plaintiff was included amongst the dependants of the deceased. In my view, this plea would suffice for a reasonable claim for contribution to be considered bearing in mind that this is a GD claim where the particulars need not be specifically pleaded. As there was evidence of contribution by the deceased to her mother during her lifetime, I made a reasonable award in the sum of *RM34,200*, being contribution at RM200 per month for 9.5 years which is the statutory multiplier.

[24] Lastly for consideration is the claim for AD which was strenuously opposed by the defendants. Inter alia, the defendants stressed that from the first plaintiff's (PW6's) evidence itself it was clear that the issue of AD arose mainly due to the issue of lack of communication between the hospital and the deceased's family and secondly, the system and operations factor at the said Hospital that had just begun operations and the hospital authorities never acted maliciously or oppressively when treating the deceased upon her admission to the facility. Be that as it may, the court has to take serious note of what was said in the leading authority on this area of the law, *Thompson v Commissioner of Police of the Metropolis* where at p 516, the English Court of Appeal held as follows:

> Aggravating features can also include the way the litigation and trial are conducted.

[25] Among the chief reasons why the courts are inclined to award AD is when the defendants refuse to admit liability in clear cases as in this instance and instead file their defence and cause the matter to be set down for trial and protracted.

[26] The plaintiffs in paras 7.6, 7.7, 7.8 and 7.9 of their first submission submitted the following factors to support and establish their claim for AD:

(a) the findings in the defendant's hospital internal inquiry report ie paras 6.2.1–6.3.2.5 which speaks for themselves;

(b) the defendant's hospital failed to give a proper explanation with regards to the deceased's condition prior to and after her death; and

(c) neither did the defendant contact the plaintiffs to offer any explanation after the completion of their internal inquiry.

[27] It was also highlighted that, in the instant case, the defendant refused to admit liability and filed a defence denying liability. Not only the defendants deny liability in their defence, they even put the blame on the deceased instead as can be seen in paras 9.1–9.3 and 10.5 of their defence as follows:

> 9. Defendan-Defendan menegaskan bahawa terdapatnya kegagalan si mati untuk mendedahkan dan/atau memaklumkan keadaan kesihatan si mati setelah dirujuk kepada Defendan-Defendan. Berikut adalah maklumat-maklumat oleh si mati dan/atau Plaintif:
>
> 9.1 Si mati pernah dimasukkan ke DEMC bagi mendapatkan rawatan untuk jangkitan saluran respiratori (kuman staphylococs) sewaktu kandungan dalam lebih kurang 7 bulan;
>
> 9.2 Sampel dari uterus si mati yang dihantar didapati mengandungi jangkitan kuman staphylococs iaitu jangkitan kuman yang sama sewaktu si mati mendapatkan rawatan di DEMC;
>
> 9.3 Si mati dan/atau Plaintif masih gagal mendedahkan tentang si mati pernah mendapat rawatan untuk jangkitan saluran respiratori (kuman staphylococs) semasa sejarah di mati diambil kali kedua pada 12.4.2017 jam lebih kurang 5.04 am.
>
> 10.5 Defendan-defendan menegaskan bahawa kegagalan si mati dan/atau Plaintif mendedahkan si mati pernah mendapat rawatan untuk jangkitan saluran respiratori (kuman staphylococs) telah menyukarkan Defendan-defendan mengambil tindakan sewajarnya pada saat yang terawal dan terpaksa mengecualikan kebarangkalian dan kemungkinan penyakit-penyakit berdasarkan kepada tanda-tanda dan/atau simptom yang dialami oleh si mati.

[28] Having considered the overall evidence, the surrounding circumstances relating to the manner the deceased met her death and the parties' contentions, I was satisfied that the established factors for awarding AD had been fulfilled by the plaintiffs on the present facts. In my considered view, the plaintiffs were correct in submitting that the contention by the defendant in putting the blame on the deceased in their defence has affected and injured the feelings of the plaintiffs since the truth is that the deceased died due to the negligence of the defendant's hospital as admitted by the defendant themselves when they conceded on liability which admitted only after all the documents for trial had been filed in court and this matter was fixed for full trial.

[29] As regards the quantum for AD, the defendants sought to invoke the principle enunciated in *Thompson v Commissioner of Police of the Metropolis* that an award of AD should not exceed twice the basic damages except where the latter is modest. Premised on the present facts and circumstances, particularly as to the level of culpability and conduct of the defendants contributing to the deceased's death and in properly dealing with her family before and after the event, I assessed the reasonable and appropriate figure for AD to be RM300,000. I duly took into account the trite principle that AD like other forms of damages is meant to be compensatory, additional to GD, and not to be punitive against tortfeasors, especially those acting in the course of duty as in this case.

CONCLUSION

[30] Upon having considered the pleadings, the contentions and submissions of counsel for both parties, the issues in dispute, the overall facts and evidence adduced and the principles of law applicable, the court's assessment of damages is as follows. In *Nam Ho Travel Service (S) Pte Ltd v Progressive Insurance Sdn Bhd* [1993] MLJU 288; [1994] 1 CLJ 280, the principle on deciding on the correct amount of damages was stated as follows:

> The principle of damages in tort is to compensate and not to enrich. The plaintiff is to be put as near as possible to the position he was in before the accident and not entitle him to profit from a misfortune ...

[31] First and foremost, the fundamental principle that needs to be reiterated is that damages should be compensatory in nature and not as a reward or be punitive in nature against the party or parties at fault. Secondly, all claims under special damages have to be specifically pleaded and strictly proved. Thirdly, in regard to aggravated damages ('AD'), all the necessary elements and criteria have to be fulfilled by the plaintiff to justify an award under AD. However, the awards should sufficiently compensate the plaintiffs and should not be inadequate but commensurate with the circumstances.

Award

Special damages — (as stated above)

General damages – Total LOSS OF SUPPORT/CONTRIBUTION

Plaintiffs 1, 3 and 4:

RM2,200pm x 9.5 years: *RM250,800*

Plaintiff 2:

RM300pm x 9.5 years: *RM34,200*

Bereavement: RM10,000

A Total general damages:

Special damages as stated above

Aggravated damages

B

[32] Having considered all the relevant factors and principles applicable as well as the absence of any oppressive or high-handed conduct by the defendants and that this form of damages is meant to be additional compensation under GD, the fair and reasonable award would be *RM300,000*.

C *Interest*

Prejudgment: 4%pa on GD from date of service of writ until judgment.

4%pa on SD from date of deceased's death until judgment.

D Post judgment: 5%pa from date of judgment until realisation.

Costs

[33] Global sum of *RM70,000* to the plaintiffs subject to allocatur to be E borne by the defendants.

[34] Judgment entered for the plaintiffs for GD and SD as assessed above with costs and interest as stated above.

F *Claim allowed with costs of RM70,000.*

Reported by Izzat Fauzan

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